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No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

BRENT RAY BREWER,
Petitioner,

-v-

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

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QUESTIONS PRESENTED

CAPITAL CASE

1. Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in Smith v. Texas, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment)?

2. Do this Court's recent opinions in Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II") and Smith, both of which require instructions that permit jurors to give "*full* consideration and *full* effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions – antedating Penry II and Smith – that reject Penry error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under Penry that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in Tennard v. Dretke, 542 U.S. 274 (2004)?

4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

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DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
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Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas death row prisoner BRENT RAY BREWER ("Petitioner") respectfully asks this Court to grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

The Fifth Circuit's opinion, Brewer v. Dretke, is reported at 442 F.3d 273 (5th Cir. 2006) and attached as Appendix A. The District Court's opinion, Brewer v. Dretke, No. Civ. A. 2:01-CV-0112-J (N.D. Tex. (Amarillo) 2004), is attached as Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on March 1, 2006. Rehearing was not sought. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment guarantee against cruel and unusual punishment, applicable against the States through the Fourteenth Amendment's due process clause, and the pre-1991 version of the Texas capital sentencing statute, Tex. Code Crim. Proc. art. 37.071. Appendix C contains the text of each.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was convicted and sentenced to death in Randall County, Texas for the murder of Robert Laminack during a robbery. His conviction and sentence were affirmed on appeal, and this Court declined review. Brewer v. State, No. 71,307 (Tex. Crim. App. 1994) (unpublished), *cert. denied*, Brewer v. Texas, 514 U.S. 1020 (1995).

Petitioner unsuccessfully sought state post-conviction relief, which was denied in an unpublished order. *Ex parte* Brewer, No. 46,587-01 (Tex. Crim. App. 2001).

Petitioner filed a habeas petition in the District Court on May 7, 2001. After the District Court requested additional briefing in light of Tennard v. Dretke, 542 U.S. 274 (2004), it granted relief as to sentence. *See* Appendix B. Respondent appealed; a panel of the Fifth Circuit reversed. Brewer v. Dretke, 410 F.3d 773 (5th Cir. 2005). Petitioner's timely petition for rehearing *en banc* was eventually denied, but upon denial of rehearing the panel withdrew its original opinion and substituted another. *See* Brewer, 442 F.3d at 275. Petitioner did not again seek rehearing.

This Petition follows.

B. Facts Material to Consideration of the Questions Presented

Petitioner was convicted and sentenced to death for the murder of Robert Laminack.

Significant mitigating evidence was introduced at Petitioner's trial, including details about Petitioner's abused background and mental illness. Petitioner and his mother were subjected to extensive physical abuse at the hands of Petitioner's father, and such abuse caused Petitioner to become violent to protect his mother from his father's assault – a fact that the prosecution emphasized in closing argument as supporting an affirmative answer to the "future dangerousness" special issue. RR XIX at 897.[1] The defense also introduced evidence establishing that Petitioner suffered from depression severe enough to have required his involuntary commitment to a psychiatric hospital just three months before his offense. The District Court summarized the evidence as follows:

> At trial, witnesses testified that Petitioner was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, Petitioner was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.
>
> Petitioner did not know his father until he was fifteen years old. After his father, Albert, reconciled with Petitioner's mother, Karon, Albert abused both Karon and Petitioner. Karon testified that Albert hit Petitioner numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit Petitioner with a stick of firewood. When Albert went outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.
>
> Petitioner witnessed the physical abuse of his mother by his father. Petitioner would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic stress disorder and depression, stated, "If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you." There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that Petitioner was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged

[1] We cite the transcript of testimony from Petitioner's trial as "R.R." ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "C.R." ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

> that the incident was his fault and that he needed to be stopped. He testified that Petitioner was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how Petitioner might pose a continuing threat to society.
>
> Petitioner became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats.

Appendix B at *1-*2.

Petitioner's trial counsel "submitted no fewer than seven proposed instructions designed to give effect to mitigating evidence," including "an entirely separate proposed special issue on mitigation evidence;" "[e]ach of these requests was denied." Id. at *2. As a result, the jury was instructed to answer only the "deliberateness" and "future dangerousness" special issues of the pre-1991 Texas capital sentencing scheme. *See* Appendix C. Defense counsel nonetheless sought to encourage jurors to respond to Petitioner's mitigating evidence by answering "no" to one of the special issues. The prosecution fought to undermine this effort, vehemently arguing that under their instructions the jurors had no authority to render a moral judgment about whether Petitioner should live or die. RR XIX at 894 (stating that the jury does not "have the power to say whether [Petitioner] lives or dies"). Instead, the prosecution insisted: "You answer the questions according to the evidence, must [sic] like you did at the guilt or innocence. That's all. It's not a matter of life and death." RR XIX at 894.

C. How The Issue Was Raised And Decided Below

As noted *supra*, the trial court made no modifications of the standard "deliberateness" and "future dangerousness" special issues of the former Texas scheme in response to the multiple requests submitted by Petitioner's trial counsel for instructions that would permit jurors to give effect

to Petitioner's mitigating evidence. Petitioner, citing Penry I, challenged the denial of additional instructions in his application for state post-conviction relief. The state courts "continued to assert that a mitigating evidence instruction was not necessary." Appendix B at *2.

The District Court found the state courts' denial of relief under Penry an objectively "unreasonable application of federal law and Supreme Court precedent." Id. at *5. It explained that, just as in Penry I, the unadorned pre-1991 special issues "were an inadequate vehicle for the jury to give effect to [Petitioner's] relevant mitigating evidence." Id. Pointing out that the mitigating evidence did "not fit squarely" into either the deliberateness or dangerousness issues, and that "in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating," the District Court concluded that "[t]he mitigating evidence presented may have served as a basis for mercy even if a jur[or] decided that the murder was committed deliberately and that Petitioner posed a continuing threat." Id. Without some additional instruction, however, jurors could not express that reasoned moral response, placing the full mitigating value of Petitioner's evidence "out of the jury's reach." Accordingly, the District Court concluded, the state courts applied Penry in an objectively unreasonable manner in denying relief. Id.

The Fifth Circuit reversed. It conceded that the jury had heard "a variety of mitigating evidence" about Petitioner, "including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression; that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him; that he had been abused by his father; that he had witnessed his father abuse his mother; and that he had abused drugs." Brewer, 442 F.3d at 275. It undertook its analysis of Petitioner's Penry claim, however, by first declaring that Smith's demand that instructions permit jurors to give "*full* consideration and *full*

effect" to mitigating evidence was simply a matter of "semantics," because "[e]ven if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79. Then, it minimized the significance of Petitioner's evidence of mental illness, which it criticized as "not based on an especially strong factual predicate," since Petitioner was "not adjudged mentally retarded" and had suffered only a "single episode" of clinical depression "without psychotic features." Id. at 275 n.1; *see also* id. at 275 (no "expert psychological or psychiatric evidence" of Petitioner's condition was presented), 279 (Petitioner's evidence reflected only "a single episode of non-psychotic major depression").[2]

The Fifth Circuit then rejected the argument that Petitioner's mental illness raised a Penry problem, applying the following *per se* rule: "This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable." Id. at 280 (footnotes omitted). Since no evidence indicated that Petitioner's mental illness was "chronic and/or immutable," Penry relief was *ipso facto* unavailable. Id. As in other recent cases, such as Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006), the court supported this conclusion with citations to its pre-Smith opinions in Lucas v. Johnson, 132F.3d 1069 (5th Cir. 1998); and Robison v.Johnson, 151 F.3d 256 (5th Cir. 1998), both

[2] The Fifth Circuit also asserted, apparently relying on Respondent's characterization of the record, that Petitioner's admission to a mental hospital was "voluntary." Brewer, 442 F.3d at 275 n.1 ("The state's brief reveals ... [that Petitioner] signed a request for *voluntary admission to* Big Springs State Hospital ....") (emphasis in Fifth Circuit opinion). This was incorrect. Petitioner was originally involuntary admitted for treatment pursuant to a court order. RR XVIII at 760. The admission became "voluntary" only when Petitioner subsequently signed a request to remain in treatment after

of which had held that evidence of any episodic or even arguably treatable mental illness could be given sufficient mitigating consideration under the "future dangerousness" question of the pre-1991 statute.

The court below applied a similar analysis to the evidence that Petitioner had suffered physical and psychological abuse as a child. It first suggested that the evidence was immaterial because, in the court's view, the abuse Petitioner suffered was not as severe as that experienced by Penry himself:

> ... [There is] a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood .... There is no easy way to locate Brewer at either pole. ... [T]he trial evidence indicates that Brewer's father hit Brewer 'numerous' times but ... this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in Penry.

Brewer, 442 F.3d at 279 n.16. Thus, the first basis for the Fifth Circuit's rejection of Petitioner's Penry claim what it called the "constitutional distinction' between being repeatedly beaten by one's father at age fifteen and suffering comparable abuse "at a very young age." The court added that Petitioner's child abuse evidence was distinct from Penry's because "Penry I consider[ed] the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*." Id. (emphasis in original; citations omitted). "It is thus doubtful that Brewer's child abuse, without additional evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment." Id. Citing its own pre-Smith decision in Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994), it concluded that "evidence of a troubled childhood," having a "temporary character," can "fall sufficiently within the ambit of the [future] dangerousness

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the involuntary, court-ordered admission expired.

instruction." Id. at 280. It further found that its recent post-Smith decisions in Coble and Cole v. Dretke, 418 F.3d 494, 506-07 (5th Cir. 2005), "bolster that proposition considerably." Id. at 281.

The panel did not explain how its analysis – that all of Petitioner's evidence of mental illness and child abuse could be considered in answering the "future dangerousness" question – could be reconciled with this Court's bedrock statement in Smith that indistinguishable mitigating evidence had "little, if anything, to do with" the narrow focus of the pre-1991 special issues. Smith, 543 U.S. at 48. Nor did it take account of any of the context of the proceedings (*e.g.*, the *voir dire* or closing arguments) in assessing how the jurors would likely have understood their range of discretion in answering the special issues.

REASONS THE COURT SHOULD GRANT REVIEW

I. THE FIFTH CIRCUIT, THOUGH REPEATEDLY ACKNOWLEDGING THAT ITS OWN DETERMINEDLY NARROW READING OF PENRY CONFLICTS WITH THIS COURT'S EXPLICIT EMBRACE OF A BROADER VIEW IN PENRY II AND SMITH V. TEXAS, HAS REFUSED TO YIELD TO THE LETTER OR THE SPIRIT OF THIS COURT'S DECISIONS.

Since 2001, this Court has issued three decisions addressing as-applied challenges to the pre-1991 Texas capital sentencing statute: Penry v. Johnson, 532 U.S. 782, 797 (2001) ("Penry II"), Tennard, and Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*). Taken together, these three decisions provide detailed doctrinal and practical guidance regarding the Eighth Amendment guarantee of individualized sentencing in the context of that statute. First, the Court twice described the test to be applied: a capital sentencing jury's instructions are "constitutionally inadequate" unless they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." Smith, 543 U.S. at 38 (emphasis in original) (citing Penry II,

532 U.S. at 797).[3] Second, the Court modeled the application of that test in a case involving a nineteen-year-old defendant with potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes, "exemplary" behavior in school despite the low IQ and learning disabilities, and a drug-addicted father who was involved with gang violence and stole from the family to buy drugs. *See* Smith, 543 U.S. at 41. As this Court explained, the bare "deliberateness" and "future dangerousness" questions of the former Texas statute were inadequate to permit the jury to give "*full* effect" to such mitigating evidence because the jury's consideration of that evidence was "tied to findings of deliberateness and future dangerousness that had had little, if anything, to do with the mitigation evidence petitioner presented." Id. at 48. Smith thus provided a sensible analysis for determining when the former Texas statute required supplemental instructions to satisfy Penry I. This Court issued its opinion in Smith in November, 2004.

Since then, however, the Fifth Circuit has consistently and repeatedly challenged whether this Court meant what it straightforwardly said in Smith. In its very first opinion citing Smith, written only a few weeks after that opinion was handed down, the Fifth Circuit implicitly acknowledged the likelihood that its own caselaw narrowly interpreting Penry I did not survive Smith – but turned the tables by suggesting that it was up to *this Court* to make yet another statement of its intent to adopt a broad reading of Penry I:

> Any reading of Smith as not being limited to mental impairment but rather reaching all types of mitigating evidence ... is inconsistent with [Jurek v. Texas, 428 U.S. 262

[3] Between Penry II and Smith, this Court decided Tennard; although the "*full* effect" language does not appear in the majority opinion in Tennard, the late Chief Justice Rehnquist's *dissenting* opinion in Tennard is premised on the theory that permitting jurors to give "some effect" to mitigating evidence would satisfy the Eighth Amendment. *See Tennard*, 542 U.S. at 290-92 (Rehnquist, C.J., dissenting). Tennard thus stands firmly in line with Penry II and Smith in rejecting anything less than "*full* consideration and *full* effect."

(1976); Graham v. Collins, 506 U.S 461 (1993); and Johnson v. Texas, 509 U.S. 350 (1993)]. We are not persuaded that the Court intended to undercut Jurek, Graham, and Johnson without even citing them. Whether Tennard or Smith sweep so broadly as to create a conflict with its own Jurek or Graham decisions is for the Supreme Court.

In re Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). Contrary to this reasoning, this Court's decision in Smith could not fairly be read as "limited to [mitigating evidence of] mental impairment" or as preserving prior Fifth Circuit doctrine restricting the scope of Penry. First, in reversing Smith's death sentence, this Court made no suggestion that Smith's mental impairment was uniquely relevant to the outcome. Second, this Court referred to the totality of Smith's mitigating evidence when it declared that the inquiries of the special issues had "little, if anything, to do with" his evidence. Smith, 543 U.S. at 48. Finally, this Court did not fail to cite Johnson in clarifying its limited reach; instead, both Penry II and Smith invoke the "*full* consideration and *full* effect" standard set forth in Justice O'Connor's **dissenting** opinion in Johnson.

A few months later, the Fifth Circuit more openly acknowledged its ongoing struggle to reconcile its own narrow reading of Penry I with the evident import of Penry II and Smith. In R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the court below weighed whether to grant a COA on a Penry claim premised on mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse," given "this Circuit's prior jurisprudence [holding that such evidence] can all be given effect through both the deliberateness and future dangerousness special issue questions." R.G. Smith, 422 F.3d at 285-86. Even as it reluctantly granted COA, the Fifth Circuit warned that Kunkle was "another hurdle" to relief on the merits (*i.e.*, "another hurdle" in addition to the Fifth Circuit's own pre-Smith caselaw), pointing out that Kunkle's reasoning would require evidence of mental impairment. Id. at 287. At the same time, however, the R.G.

Smith panel conceded that this limitation was "the exact opposite" of what this Court said in Smith:

> We note that the Supreme Court has never explicitly stated that Penry claims cannot be extended beyond claims involving evidence of "mental impairment." In fact at times, it seems the Court has said the exact opposite. For example, in Smith v. Texas, the defendant put forward evidence of (1) organic learning disabilities and speech handicaps; (2) verbal IQ score of 75 and a full IQ score of 78; (3) his exemplary behavior at school despite his learning disabilities; (4) the involvement of his father with drugs and gang violence; and (5) Smith's young age of nineteen at the time he committed the crime. In granting his Penry claim, the Supreme Court did not in any way highlight any particular piece of Smith's evidence. The only mention the Smith Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that "[j]ust as in Penry II, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in Penry II, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented."

Id. at 287 n.8 (citation omitted). Having acknowledged the tension between the Fifth Circuit's own decisions and this Court's, however, the R.G. Smith panel went no further towards resolving it.

In a third decision, handed down on March 1 of this year, the Fifth Circuit again conceded that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by Penry II and Smith. This Court had remanded Tennard v. Dretke after concluding that the Fifth Circuit erred in relying on its baseless "constitutional relevance" doctrine to deny COA on Tennard's Penry I claim. On remand, the Fifth Circuit first traced the history of this Court's treatment of challenges to the former Texas capital sentencing scheme. *See* Tennard v. Dretke, 442 F.3d 240, 246-252 (5th Cir. 2006). It then acknowledged that this Court's unmistakably clear language in Smith is "in tension with ... Graham and Johnson:"

> In Smith v. Texas, the Court indicated that capital sentencing procedures are constitutionally infirm whenever they do 'not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing the defendant's

> appropriate sentence.' . . . This language, which originated in Justice O'Connor's Johnson v. Texas dissent, may be in tension with Jurek and its progeny, particularly Graham and Johnson.

Id. at 253 n.17 (citations omitted). As it had in R.G. Smith, however, the Fifth Circuit in Tennard discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

It is plain that Kunkle's bold challenge to this Court's decision in Smith, though technically *dicta*[4], presaged what has become the Fifth Circuit's refusal to embrace the reading of Penry articulated in Smith. The Fifth Circuit now essentially acknowledges that to the extent this Court demands that jury instructions permit *all* mitigating evidence to be given "*full* consideration and *full* effect," in the plain language of Penry II and Smith, such a requirement represents "the exact opposite" of the Fifth Circuit's own view, which insists on the primacy of Johnson and endorses instructions so long as they do not altogether *prevent* evidence from being taken into account, however tangentially. In no case, however, has the Fifth Circuit confronted the implications of the fact that both Penry II and Smith cite Justice O'Connor's dissenting opinion in Johnson as stating the standard for assessing whether jury instructions permit robust individualized consideration of a defendant's proffered mitigating circumstances.

Moreover, the Texas Court of Criminal Appeals ("CCA"), has stated that it, too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex.

[4] Kunkle involved a successive application for federal habeas relief. Thus, the key question for the Fifth Circuit was whether Tennard and/or Smith announced a "previously unavailable" rule of law retroactively applicable on collateral review. *See* 28 U.S.C. § 2244(b)(2). The court answered this question in the negative. Kunkle, 398 F.3d at 684-85. It proceeded to discuss the merits of Kunkle's Penry I claim in an alternative holding, where it expressed the view that a literal reading of Smith would collide with Jurek, Graham, and Johnson.

Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35. This Court should grant review in Petitioner's case to conclusively resolve the "uncertainty" that troubles the CCA, as well as the "tension" the Fifth Circuit concedes to exist between its cases and this Court's most recent opinions interpreting Penry.

Despite the clarity of the guidance this Court has previously provided the Fifth Circuit and the Texas courts on comparable questions, this Court's intervention is once again necessary to resolve once and for all the enduring confusion in the courts below regarding the scope of Penry. The Fifth Circuit, while acknowledging that "tension" exists between its own decisions and those of this Court, refuses to abandon its own pre-Penry II, pre-Smith caselaw. Absent correction, the Fifth Circuit will evidently continue to maintain that jurors limited to answering whether a killing was "deliberate" and whether the defendant might be dangerous in the future could somehow express in those answers their reasoned moral response to mitigating evidence like Petitioner's history of a destructive family background, the severe emotional and psychological scars he suffered as a result, and his neurological dysfunction and impaired impulse control. That reasoning is squarely irreconcilable with Smith, and this Court should grant review and say so.

A. IN A STRING OF RECENT DECISIONS INCLUDING PETITIONER'S CASE, THE FIFTH CIRCUIT HAS REFUSED TO ACKNOWLEDGE OR FOLLOW THIS COURT'S PRONOUNCEMENT IN SMITH THAT EVIDENCE OF CHILDHOOD ABUSE AND MISTREATMENT, LIKE THAT PRESENTED BY PETITIONER, "HAS LITTLE, IF ANYTHING, TO DO WITH" THE FORMER TEXAS SPECIAL ISSUES AND THUS REQUIRES ADDITIONAL INSTRUCTIONS BEYOND THOSE NARROW INQUIRIES.

As noted, Petitioner presented extensive evidence that he was "emotionally and physically abused by his father," including being "hit ... numerous times with items such as the butt of a pistol, a flashlight, and his [father's] fists," and being warned that his father would kill him if he ever dared to fight back. Appendix B at *1. It is well-settled that this evidence could reasonably serve as the basis for a life sentence. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (defendant's "turbulent family history" was "relevant mitigating evidence"); Penry I, 492 U.S. at 322 (defendant's abused childhood bore mitigating relevance to his moral culpability). More important, this Court confirmed in Smith that such evidence about the deprived circumstances of a defendant's background "*has little, if anything, to do with*" the deliberateness of the crime *or* the likelihood that the defendant poses a "continuing threat to society." Smith, 543 U.S. at 48 (emphasis added). For that reason, its mitigating value falls "beyond the scope" of those questions, requiring additional instructions to place the evidence fully within the jury's reach. *See* Penry I 492 U.S. at 321-22.

Not only do the relevant mitigating qualities of such evidence "have little ... to do with" the probability that the defendant will be dangerous in the future, but evidence that a defendant was physically and psychologically abused as a child generally bears an *aggravating* relationship to his prospects for non-violent behavior in the future. Common sense teaches that an adult who spent his

childhood or adolescence in such a destructive environment may well lack the self-control and judgment to avoid acting out violently. *See* Penry I, 492 U.S. at 323. As a result, in the eyes of jurors shackled to the future dangerousness question, "child abuse serves as an aggravating, rather than mitigating, factor." Robertson v. Cockrell, 325 F.3d 243, 278 (5th Cir. 2003) (*en banc*) (Dennis, J., dissenting) (footnote omitted). In his dissent, Judge Dennis observed that:

> ...Chief Justice Rehnquist noted in a different context in Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting), "[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." Given such common knowledge of the greater likelihood of recidivism among abused children, the Texas special issues leaves a jury with no room to register its conclusion that while a defendant is a future threat to society, his abuse as a child reduces his responsibility for that threat, making use of the death penalty inappropriate.

Id.

Prior to this Court's decisions in Tennard and Smith, the Fifth Circuit generally denied Penry I claims premised on evidence of a troubled childhood background by applying its "constitutional relevance" screening test, which such evidence invariably failed – either because it was regarded as insufficiently "severe," or because it had no explicit causal "nexus" with the crime. On those occasions when the Fifth Circuit addressed the capacity of the pre-1991 special issues to afford such evidence meaningful consideration as mitigating, it simply asserted, without explanation, that evidence of such trauma could be considered *as mitigating* under the "future dangerousness" question. *See, e.g.*, Robertson, 325 F.3d at 253 (finding that "the statutory special issues were adequate to allow the jury to effectuate the mitigating potential of" the defendant's "sketchy evidence of beatings" by his father); *see also* id. at 249-250 n.7 (citing numerous cases where "childhood abuse was proffered as mitigating evidence" and the Fifth Circuit denied Penry relief).

Even after Penry I, in which this Court found that evidence of childhood abuse could not be given mitigating consideration within the scope of the pre-1991 special issues, the Fifth Circuit's argument that evidence of childhood trauma could support a "no" answer to the future dangerousness question was logically indefensible. But after Smith, in which this Court found the pre-1991 special issues constitutionally deficient as applied *specifically* to evidence of a deprived childhood background, and explicitly held that the mitigating qualities of such evidence were *not relevant* to either the "deliberateness" or "future dangerousness" issues, it is remarkable that the Fifth Circuit has continued steadfastly to maintain, in effect, that this Court must have been mistaken.

First, of course, the Fifth Circuit found in Petitioner's own case that his evidence of having suffered physical and psychological abuse as a child was immaterial because, in the court's view, it was not as severe as Penry's. As the court below explained,

> ... [There is] a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood .... There is no easy way to locate Brewer at either pole. ... [T]he trial evidence indicates that Brewer's father hit Brewer 'numerous' times but ... this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in Penry.

Brewer, 442 F.3d at 279 n.16. Thus, the first basis for the Fifth Circuit's rejection of Petitioner's Penry claim was that being repeatedly beaten by one's father at age fifteen is less "severe" than (*i.e.*, "does not rise to the level of") suffering comparable abuse "at a very young age," a difference the court below characterized as a "constitutional distinction." The court went on to add that Brewer's child abuse evidence was distinct from Penry's because "Penry I considers the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*." Id. (emphasis in original; citations omitted). "It is thus doubtful that Brewer's child abuse, without additional

evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment." Id. Citing its own pre-Smith decision in Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994), it concluded that "evidence of a troubled childhood," having a "temporary character," can "fall sufficiently within the ambit of the [future] dangerousness instruction." Id. at 280. It further found that its post-Smith decisions in Cole and Coble "bolster that proposition considerably." Id. at 281.

Petitioner's case is no isolated anomaly. Since Tennard and Smith, the Fifth Circuit has repeatedly considered Penry claims involving comparable evidence of an abused, traumatic or deprived background. Each time, it has concluded that, notwithstanding Smith, the jury could give such evidence full mitigating effect in deciding whether the defendant posed a "future danger" – and has consistently cited the logic of its own pre-Smith opinions in support of that holding. *See, e.g.*, Newton v. Dretke, 371 F.3d 250, 256-57 (5th Cir. 2004) (evidence of defendant's difficult background was within the scope of the pre-1991 special issues) (citing James v. Collins, 987 F.2d 1116, 1121-22 (5th Cir. 1993) (evidence of, *inter alia*, "impoverished and abusive family history" could be adequately considered by jury under special issues)); Cole v. Dretke, 418 F.3d 494, 506-07 (5th Cir. 2006) (because defendant's background of abandonment, neglect, and deprivation "did not suggest that he was unable to learn from his mistakes," it was not likely to have been viewed by the jury "as an aggravating factor *only*," and thus Penry was not implicated because "the jury could have considered Cole's family background ... under – at the least – the future dangerousness special issue") (emphasis added); Coble v. Dretke, 444 F.3d 345, 362-63 (5th Cir. 2006) (citing Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994) to "reject [the] contention that the Texas special issues did not provide an adequate vehicle for the jury to make a reasoned moral response to Coble's mitigating

evidence of his troubled childhood"). Indeed, the Fifth Circuit now regards this conclusion as so self-evident that it no longer requires *any* citation to authority. *See* Draughon v. Dretke, 427 F.3d 286, 297-98 (5th Cir. 2005) (in response to defendant's "claim that the jury could not give effect to his evidence of abuse as a child and 'dysfunctional upbringing' in violation of Penry," stating only that "under controlling precedent [the claim] is lacking in merit. The jury could have given [the evidence] effect under the future dangerousness special issue.").

Leaving aside the fact that this reasoning is irreconcilable with the facts and the outcome of Smith, the Fifth Circuit's analysis fails to enforce a "fair reading" of Penry I as required by Johnson itself, the case upon which the court below purports to base its narrow interpretation of Penry I. Johnson emphasizes that the jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. 509 U.S. at 369. Because the "signature qualities of youth are transient," the future dangerousness question presented a "meaningful basis" for the jury to consider the fact of Johnson's youth. 509 U.S. at 368-69. Johnson does not imply, much less hold, that evidence of childhood physical and psychological abuse like Petitioner's would fall outside Penry I's ambit. Instead, the evident implication of Johnson is that in Penry I the "relevant mitigating qualities" of Penry's evidence of childhood trauma (and thus of Petitioner's experience of physical and emotional abuse in his early teens) found no reliable expression in the jury's answers to the special issues.

In short, the relevant mitigating quality of Petitioner's childhood abuse and mistreatment is *not* that there exists some remote possibility that the destructive psychological and emotional consequences of those life experiences might eventually abate. Instead, the relevant mitigating dimension of Petitioner's traumatic background is that, by virtue of its influence on his behavior and

judgment at the time of the crime, it significantly diminishes his moral culpability. *Cf.* Penry I. That jurors must be afforded an adequate vehicle for responding to *this* aspect of a defendant's mitigating evidence is precisely what it means to insist on instructions that permit the jury to give "*full* consideration and *full* effect" to such evidence "in choosing [the] appropriate sentence." Smith, 543 U.S. at 38. The Fifth Circuit's treatment of Penry claims based on childhood abuse, deprivation and trauma is hopelessly in conflict with Smith. Moreover, its casual dismissal of Petitioner's experience of abuse as insufficiently "severe" to raise concerns under Penry is precisely what this Court criticized in Tennard when it warned against attempts to limit mitigating circumstances to "only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe')." Tennard, 542 U.S. at 287.

The tension between the Fifth Circuit's begrudging view of the mitigating significance of childhood mistreatment and this Court's contrary view is further exacerbated by Williams v. Taylor, 529 U.S. 362 (2000). In addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence "may not have overcome a finding of future dangerousness." 529 U.S. at 398. But the Court nonetheless found prejudice because a "description of Williams' childhood, filled with abuse and privation" could "well have influenced the jury's appraisal of his moral culpability." This conclusion necessarily entails the conclusion that evidence of childhood deprivation possesses mitigating significance *independent of its relationship to the defendant's likely future dangerousness*. Hence, jurors limited exclusively to assessing dangerousness cannot give "*full* consideration and *full* effect" to such evidence.

This Court should grant *certiorari* in Petitioner's case to examine the Fifth Circuit's

treatment of this issue.

B. THE FIFTH CIRCUIT'S POST-SMITH PRACTICE OF REFLEXIVELY CHARACTERIZING MENTAL DISORDERS LIKE PETITIONER'S AS "NON-PERMANENT" – AND THUS ALLEGEDLY MITIGATING UNDER THE "FUTURE DANGEROUSNESS" INQUIRY – SIMPLY RESURRECTS AS A *PER SE* BAR TO PENRY RELIEF THE "SEVERITY" SCREENING TEST THIS COURT EXPLICITLY REJECTED IN TENNARD.

Petitioner, like Penry, presented evidence that he suffers from a mental disorder. In Petitioner's case, that mental illness is clinical depression, for which he was involuntarily committed to a mental hospital three months before trial. *See* Appendix B at *2. Other evidence indicated as well that Petitioner was psychologically dominated and controlled by a romantic partner who was his co-defendant in the instant capital offense. Id.

The Fifth Circuit found that Petitioner's evidence of mental illness was within the jury's "effective reach" under the "future dangerousness" question, applying a *per se* rule distinguishing chronic or permanent mental disorders (such as, *e.g.*, mental retardation) from any other type or manifestation of mental illness. Brewer, 442 F.3d at 280 ("This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable") (footnotes omitted). Since Petitioner's mental disorder was non-permanent, the future dangerousness issue was an adequate vehicle for the jury to give it "sufficient" mitigating consideration and effect. Id. at 278-79.[5] As in

[5] This conclusion was consistent with the court's view that Smith's mandate that instructions permit jurors to give "*full* consideration and *full* effect" to mitigating evidence was simply a matter of

other post-Smith decisions, the Fifth Circuit supported this conclusion with citations to its pre-Smith opinions in Lucas and Robison. Id. at 280 n.17 & n.18.

The Fifth Circuit has offered variations on the same *per se* rationale – identifying a defendant's mental disorder as "non-severe" or "non-permanent," and then asserting that *any* such condition can by definition be given mitigating effect under the "future dangerousness" question – repeatedly in the wake of Smith. For example, the defendant in Coble, *supra*, presented expert testimony that he suffered from "two psychiatric disorders: post-traumatic stress disorder, brought about by his Vietnam experiences, and a bipolar disorder." Coble, 444 F.3d at 359. Coble's experts conceded that his mental disorders "would make him a continuing threat," but some testimony also indicated that Coble "would be less likely to be violent if he took medication." Id. at 359-360. Citing the same pre-Smith cases cited in denying relief to Petitioner, the Fifth Circuit concluded based on that testimony that "Coble's mitigating evidence demonstrated that his mental illness was treatable, thus placing it within the effective reach of the sentencer" under the "future dangerousness" question, as "[t]his Circuit has previously held." Id. at 361 (citing Lucas and Robison). Similarly, the defendant in Cole presented mitigating evidence that he suffered from "organic neurological deficiency." In that case, the court below asserted that even such an apparently longstanding disability bore mitigating relevance to the "future dangerousness" inquiry. Cole, 418 F.3d at 505-08. (jurors "could have considered Cole's ... organic deficiency evidence under [the] future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have [found] that, although Cole ... may suffer from diminished impulse control, he is

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"semantics." "Even if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79.

capable of change and thus would not necessarily remain a danger in the future").

These cases well illustrate the Fifth Circuit's *per se* rule, to which it clings notwithstanding Smith, that any "non-severe" or "non-permanent" mental disorder is unproblematic under Penry I. That inflexible rule amounts to an attempt to resurrect the threshold screening test this Court rejected out of hand in Tennard. Where, prior to Tennard, the Fifth Circuit reflexively dismissed any non-permanent condition by holding, "Any mental disorder that is not chronic or permanent is not 'constitutionally relevant mitigating evidence,'" it now reflexively dismisses the same evidence by holding, "Any mental disorder that is not chronic or permanent can support a 'no' answer to the 'future dangerousness question, so no additional instructions are necessary." This *per se* rule is nothing more than the now-discredited "uniquely severe permanent handicap" standard by another name. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.

The Fifth Circuit's analysis fails profoundly to appreciate what is actually *mitigating* about a defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability for the crime. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe, or interfere less with the defendant's functioning in the world. Contrary to the Fifth Circuit's reasoning, the potential mitigating significance of Petitioner's clinical depression is not reduced by the fact that he suffered only a "single episode" rather than repeated episodes, or the fact that his depression manifested itself "without psychotic features." Brewer, 442 F.3d at 275 n.1. None of

these aspects of the "severity" of Petitioner's mental disorder placed the relevant mitigating qualities of that condition within the reach of jurors permitted to answer only whether Petitioner would be dangerous in the future.

Contrary to the Fifth Circuit's view, even if a juror believed that Petitioner would never again suffer an episode of clinical depression, that did not transform the "future dangerousness" inquiry into an adequate vehicle for the jury to give effect to its reasoned moral response to the evidence of Petitioner's mental disorder. If a juror concluded that Petitioner's mental disorder was acting on him at the time of the crime and thereby reduced his moral culpability, but *also* concluded based on the evidence as a whole that Petitioner might well act out violently in the future, regardless of whether he suffered additional bouts of clinical depression, she would have no vehicle for expressing the conclusion that a sentence less than death was warranted. The jury charge did not permit a juror to express the reasoned moral judgment that, because of Petitioner's mental disorder, a life sentence was appropriate even though Petitioner was likely to remain a "continuing threat to society."

The Fifth Circuit errs in the view that allowing jurors to consider and give effect to the "non-permanent" nature of a serious mental disorder is an acceptable substitute for allowing them directly to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to consider whether the Fifth Circuit's imposition of strict "severity" and "permanence" requirements for Penry relief in cases presenting evidence of mental disorder can be sustained in light of Tennard and Smith.

C. THE FIFTH CIRCUIT'S PENRY ANALYSIS FAILED TO GIVE DUE REGARD TO THE FACT THAT HERE, AS IN MANY CASES TRIED UNDER THE PRE-1991 SENTENCING STATUTE, PROSECUTORS REPEATEDLY SOUGHT TO EXPLOIT THE NARROW SCOPE OF THE FORMER SPECIAL ISSUES AND REMIND JURORS THAT THEY WERE DUTY-BOUND TO ANSWER THOSE ISSUES ON THEIR OWN TERMS AND NOT TO ACHIEVE A JUST RESULT IN LIGHT OF PETITIONER'S MITIGATING EVIDENCE.

This Court has acknowledged that the context of the proceedings is relevant in determining whether a jury could reasonably have given effect to the defendant's mitigating evidence under its instructions. Boyde v. California, 494 U.S. 370, 383 (1990); Penry, 532 U.S. at 800-02 ("[W]e will approach jury instructions in the same way a jury would – with a commonsense understanding of the instructions in the light of all that has taken place at trial.") (internal quotations omitted). Another vice of the Fifth Circuit's post-Smith treatment of Penry claims is that the court never examines either the arguments of counsel or the information provided to jurors during *voir dire* as a source for illuminating how the jurors may have understood the pre-1991 special issues to limit their sentencing discretion. The record of Petitioner's case is representative in this regard; both at *voir dire* and at closing argument, the prosecutors took advantage of the textual narrowness of the special issues and the jurors' oath to answer them according to the evidence – yet the Fifth Circuit failed to acknowledge, much less engage, those important facts in determining whether Penry was violated.

During *voir dire*, the prosecutor repeatedly emphasized to prospective jurors that they would have *no discretion* in assessing punishment, but instead would be duty-bound to answer the special issues according to the evidence. This exchange with juror Robertson is representative:

> You know, our laws basically say that in a capital murder case, a jury must answer certain questions at the punishment phase, and depending on how those questions are answered, it may fall upon – well, it does. The law basically says that the Judge, not the jury, assesses the punishment in a capital murder case. So it's not a situation

where a jury [sic] has said, "Okay. You've heard the evidence. Now, tell us what needs to be done to this particular defendant for committing this act." It's not the way the system works.

The way the system works, the questions are submitted to the jury at the punishment phase of the trial. And again, we're assuming that there has already been a guilt or innocence hearing that the defendant has been found guilty of ... capital murder, and now we go to the punishment part. At a capital murder case, at the punishment part of the trial, these questions are given to a jury and the jury is called upon to render an answer "yes" or "no" based upon the evidence. If all of the questions ... are answered "yes," then this Court is mandated by law to assess the punishment of death. . However, if any of the questions are answered "no" by at least ten jurors, then this Court also is mandated according to the law to assess the punishment of life imprisonment.

So you can see automatically that there's not any discretion from the standpoint of the Judge because it depends on how those questions are answered. [W]hen we go over the questions themselves, you'll see that *there's not a lot of discretion that's really allowed to a jury* because they pertain to evidence that you're going to hear at the guilt or innocence part of the trial, and also at the punishment part of the trial. And they're going to really place you in the position of answering them "yes" or "no," depending upon what you think the proper answer is according to the evidence you hear. ...

RR XIII at 1969-70 (emphasis added). After reviewing the text of the special issue questions with juror Robertson, the prosecutor continued:

Do you feel that as a juror *you would be able to answer those questions ... "yes" or "no" depending upon the evidence that you heard during the trial without regard to the sentence that the Judge must impose* according to the law? ... In other words, as a juror, you have to look at the evidence and answer the questions "yes" or "no." And I will submit to you that for the State and for the Defendant to receive a fair trial, you have to answer those according to ... the evidence submitted, without regard to the punishment that this Court must assess. It's very important that jurors be able to do that because *their job is not to determine whether a person goes to the penitentiary for life imprisonment or whether the person should be executed according to the laws of this State. What's important is that the jury look at the evidence and answer those questions "yes" or "no" based solely upon the evidence* that they hear in this courtroom.

Id. at 1972-73 (emphases added).

This theme – that the jurors were bound by their oaths to answer the special issues according to the evidence, and that they were not authorized by their instructions to choose an appropriate sentence according to their assessment of the defendant's culpability, was persistently rehearsed by the prosecutor with juror after juror. *See, e.g.*, RR X at 1449 (prosecutor to juror Needham: "I think when you look at these ... questions that are submitted, you're going to find that there's *not a lot of discretion, that those questions should be answered, not to determine what punishment should be inflicted, but should be answered according to the evidence*") (emphasis added); RR XII at 1853 (prosecutor to juror Stephen: "Our law says the jurors can't do that [answer the special issues to ensure a particular sentence is imposed]. Our law says that the jury has to answer those questions according to the evidence. And basically, the law requires a juror be able to answer those without considering what the result of the answers may be;" elicits juror's agreement to "answer those questions ... according to the evidence, without regard to the punishment that this Court must assess"); RR XI at1652 (prosecutor to juror Stafford: "The laws of this State require that *if you feel that life imprisonment is a proper form of punishment, you set that feeling aside and render your decision according to those answers [sic] the way they should be answered under the evidence that you hear* and under the laws of this state") (emphasis added); RR VI at 624 (prosecutor to juror Ambers: *"[Y]ou don't have any discretion from the standpoint of what punishment is assessed,* ...this Court has no discretion at what punishment is assessed. You can see very easily that the way these questions are answered determines what punishment is going to be applied according to the law") (emphasis added), 626 (prosecutor to juror Ambers: "[T]his is what it really gets down to, I guess, with all the talking we've done: As a juror, our law says that you must render a decision according to the law of this State and according to the evidence that you hear. Would you be the

kind of juror that could answer those questions according to the evidence without considering what effect and what the law of this State may require this Judge to do as far as the punishment?"); RR VIII at 1091 (prosecutor to juror White: "So you can see that the ultimate decision about what punishment is to be assessed really lies within the laws of the State because the Judge doesn't have any discretion in the punishment. And, of course, the jury is going to be answering questions about the evidence itself. Now, do you feel that you would be able to answer the questions that are submitted to you at the punishment phase of the trial without considering what punishment this Court must assess according to the law?").

All these statements by the prosecutor at *voir dire* are relevant to any claim – such as that made by the court below in denying relief – that the jurors in Petitioner's case understood themselves to be authorized to express their "reasoned moral response" to Petitioner's mental illness and child abuse in answering the "future dangerousness" question, as opposed to simply answering that question directly "according to the evidence." Yet, the Fifth Circuit never even considered whether the record supported such an inference. Plainly, it does not.

Nor did the court below acknowledge that the inadequacy of the pre-1991 special issues as applied to Petitioner's mitigating evidence was apparent from the closing arguments at punishment. From the Fifth Circuit's holding – that jurors doubtless understood that Petitioner's background of physical and psychological abuse and his mental illness could support a "no" answer to the "future dangerousness" question – one would expect to see *some* version of that argument offered by defense counsel. But Petitioner's trial counsel never argued that Petitioner's mitigating evidence logically supported a negative answer to the "future dangerousness" question. Instead, after reviewing the various pieces of evidence presented by the State in support of a finding of "future dangerousness,"

defense counsel simply said, "I'm fixing to sit down now, but I want you to realize that this is what we're here for. *You're determining what to do about Brent* in answering those special issues." RR XIX at 885 (emphasis added). In the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." Penry I, 492 U.S. at 325. Ultimately, counsel in both cases were reduced to making arguments that did not attempt to help the jurors reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question, but for all practical purposes simply pleaded for nullification.

Nor did the Fifth Circuit, in rejecting Petitioner's Penry claim, attend to the prosecutor's arguments. Here, just as in Penry I and Smith, the prosecutor responded to defense counsel's plea for mercy by demanding that jurors honor their oath to answer the special issues honestly according to the evidence, or else deny all parties "a fair trial:"

> Contrary to what [defense counsel] would have you believe, I don't have the power to say whether he lives or dies. *You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, [j]ust like you did at the guilt or innocence. That's all.* It's not a matter of life or death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer. And every one of you people told me you would base that not on the result, but upon what the evidence dictates you must do. If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held. You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

RR XIX at 894-95 (emphasis added). The prosecutor also argued that even if Petitioner's background had resulted in his being dangerous, his dangerousness was all that mattered:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change.* That will never change.

RR XIX at 898 (emphasis added).

This Court confronted a very similar argument in Tennard, finding that "the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence but also because the prosecutor told them to do so: '[W]hether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.'" Tennard, 542 U.S. at 288-89. The prosecutor's closing argument against Petitioner – that "[w]hatever got him to this point, he is what he is today. And that will never change" – had precisely the same impact. In both cases, "the prosecutor's comments pressed exactly the most problematic interpretation of the special issues," suggesting that the defendant's most important mitigating evidence "was irrelevant in mitigation, but relevant to the question whether he posed a future danger." Id. at 289.

The prosecutor summed up his argument with the same point he had made emphatically so many times during *voir dire*: that the jurors' sworn obligation was to answer the special issues according to the evidence, not according to what sentence they thought was appropriate in light of that evidence:

> But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no," you're not looking. It's nothing but a sympathetic verdict. You can't get more deliberate than ... that. If you feel comfortable that he will be walking in any society, in the penitentiary or anyone else, and he will not be a continuing threat to whoever is around him, that can be your decision, and you can sleep with it, and we'll live with it. *But base your decision on what's dictated according to the facts and not on what punishment must be assessed. Do what the facts say, answer the questions according to the law, and a fair trial will be held.*

RR XIX at 899-900 (emphasis added). This argument is precisely the type of entreaty this Court pointed to in Penry I and Smith as reflecting the inadequacy of the pre-1991 special issues to permit full consideration of mitigating evidence. *See* Penry I, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); Smith, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'yes' answer to the special issues as long as the State met its burden of proof").

This Court emphatically has made clear that "nullification" is not an appropriate strategy for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. Penry II, 532 U.S. at 790; Smith, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Petitioner even less protection than the defendants in those cases. Absent instructions to consider Petitioner's background of abuse and his mental disorder as it bore on his moral culpability, the jurors were bound by their oaths – as the prosecutor urged – to return an affirmative answer to the second special issue.

In sum, the context of the proceedings as a whole, including *voir dire* and closing arguments as well as the evidence presented and the sentencing instructions and verdict form, argue for relief under Penry. The prosecutor understandably sought to exploit the narrow inquiry of the special issues, and defense counsel effectively asked for jury nullification in response. The Fifth Circuit, in improvising *post hoc*, counterintuitive ways in which the special issues might have been read more broadly by the jurors, ignored this vital contextual evidence in contravention of this Court's direction

in Boyde, Penry I, Penry II, and Smith. The Court should grant *certiorari* to clarify that a proper Penry analysis must take account of not only what evidence was presented, but what jurors were told (and thus likely understood) about the meaning of their instructions and the scope of their sentencing discretion.

II. LEFT UNCHECKED, THE FIFTH CIRCUIT'S APPROACH WILL RESULT IN THE EXECUTION OF SCORES OF DEFENDANTS WHO WERE DENIED MEANINGFUL CONSIDERATION OF THEIR MITIGATING EVIDENCE.

It is understandable that this Court may ask how many times it must spend its resources reviewing death sentences imposed under a capital sentencing statute that was rightly jettisoned fifteen years ago. After all, as the Court observed in Penry II, Texas fixed the constitutional flaw in its statute in 1991. Penry II, 532 U.S. at 803. Today, jurors in every Texas capital case – like those in every capital case everywhere else in the U.S. – are provided an unambiguous and appropriately broad vehicle for giving *direct* mitigating effect to evidence about the defendant's character and background. No defendants in the future will suffer Petitioner's fate of being sentenced to death at age nineteen by jurors unable to give meaningful consideration to evidence of physical and psychological abuse as a child and serious mental illness as a young adult.

Nevertheless, the size and scope of the continuing "Penry problem" warrants this Court's intervention. At oral argument in Tennard in March 2004, the Court asked how many prisoners sentenced under the pre-1991 statute remain on Texas' death row. Counsel for Respondent answered, "By my last count there are approximately 100 ... on [d]eath [r]ow in Texas who were sentenced under this [pre-1991] sentencing scheme ...." Transcript of Oral Argument, Tennard v. Dretke, 2004 WL 720119 at *43. Petitioner's counsel estimated the number at "closer to 50." Id. at

*51. Information available online from the Texas Department of Criminal Justice indicates that 65 to 70 prisoners on Texas' current death row were sentenced under the pre-1991 statute (*i.e.*, were sentenced for offenses committed prior to September 1, 1991). Regardless of which of these numbers is correct, any of them would represent a substantial proportion of Texas' death row, which is one of the largest in the Nation. Indeed, the group of Texas prisoners who stand to be affected by a decision resolving the scope of Penry is larger than the entire death rows of many States, making the issue presented by Petitioner's case not just important, but certain to recur before this Court.[6]

Finally, it should make no difference that the *en banc* Fifth Circuit is presently weighing the scope of Penry in Nelson v. Dretke, No. 02-11096. After this Court granted *certiorari* and remanded for further consideration in light of Tennard, *see* Nelson v. Dretke, 542 U.S. 934 (2004), the Fifth Circuit initially denied relief in an opinion generally indistinguishable from its other post-Smith decisions, finding that Nelson's evidence of severe borderline personality disorder and childhood deprivation and mistreatment could be given mitigating effect under the "deliberateness" and "future dangerousness" questions. *See* Nelson v. Dretke, 442 F.3d 282 (5th Cir. 2006). Two weeks later, however, rehearing *en banc* was granted *sua sponte*. Nelson v. Dretke, 442 F.3d 912 (5th Cir. 2006).

[6] Counsel is aware of at least seven other Penry cases presently pending in the Fifth Circuit alone, in addition to three in (or coming to) this Court. Those pending in the Fifth Circuit include Coble v. Dretke, No. 01-50010 (pending on petition for rehearing; *see* Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) (denying Penry claim premised on evidence of child abuse, mental disorder, and good character); Mines v. Dretke, No. 03-11137 (*see* Mines v. Dretke, 118 Fed.Appx. 806 (5th Cir. 2004) (unpublished) (granting COA on Penry claim based on evidence of episodic mental disorder)); Chambers v. Dretke, No. 03-11248 (see Chambers v. Dretke, 145 Fed.Appx. 468 (5th Cir. 2005) (unpublished) (granting COA on Penry claim based on evidence of deprived background and positive family relationships)); R.G. Smith v. Dretke, *supra*; Bower v. Dretke, No. 03-40980 (*see* Bower v. Dretke, 145 Fed.Appx. 879 (5th Cir. 2005) (denying COA on Penry claim premised on evidence of good character); Reed v. Dretke, No. 05-70046; and Garcia v. Dretke, No. 03-11097. The cases in this Court include Petitioner's case, Cole v. Dretke, *supra*; and Summers v. Dretke , No. 05-11074,

Petitioner respectfully submits that this Court should not defer action in his case in the hope that the *en banc* decision in Nelson might disavow the suffocatingly constricted reading of Penry that currently prevails in the Fifth Circuit. The Nelson panel opinion did not even produce a dissent, and no other Fifth Circuit case has taken this Court's opinion in Smith at its word. This issue is ripe for this Court's review *now*, in Petitioner's case.

III. THE FIFTH CIRCUIT'S APPROACH IN THESE CASES, LIKE ITS ARTICULATION OF THE "SEVERITY" AND "NEXUS" TESTS, THREATENS TO UNDERMINE THE ROLE OF INDIVIDUALIZED SENTENCING IN ENSURING A LINK BETWEEN MORAL CULPABILITY AND CAPITAL SENTENCING VERDICTS.

The Fifth Circuit's refusal to give Penry I a "fair reading" even after Smith and Tennard represents a continuing failure to appreciate the significance of the individualization requirement and the vital role it plays in the structure of this Court's post-Furman capital sentencing jurisprudence. As we show below, this tendency was apparent prior to Tennard in the Fifth Circuit's rigid enforcement of its screening test for "constitutionally relevant mitigating evidence." Smith, by modeling the correct Eighth Amendment approach, provided even greater guidance for the Fifth Circuit to alter its unfounded approach. But the recrudescence of the Fifth Circuit's "uniquely severe permanent handicap" test this year, in the form of categorical *per se* rules excluding entire classes of mitigating evidence from Penry's ambit because they are not as "severe" as the particular facts of Penry itself, once again demands this Court's intervention.

As is now familiar, this Court's post-Furman cases strive to minimize arbitrariness in capital sentencing by (1) narrowing the class of "death-eligible" offenses and ensuring that particular offenders are reliably determined to fall into that class, and (2) ensuring that the sentence imposed on

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as well as Laroyce Smith's own case.

a particular offender represents a "reasoned moral response" to his unique background and character and the circumstances of the offense. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 972 (1994) (describing "eligibility" and "selection" decisions). With respect to the latter process, this Court has stated that "[w]hat is important at the selection stage is an *individualized* determination [of the appropriate sentence] on the basis of the character of the individual and the circumstances of the crime." Id.(emphasis in original; citations omitted).

In light of this longstanding emphasis on capital sentencing as an "*individualized* determination" of the appropriate sentence, perhaps the most grave problem with the Fifth Circuit's initial response to Penry was its development of a rigid "screening test" to exclude most types of evidence *ex ante* from consideration as potentially Penry-problematic. The screening test defined as "constitutionally relevant mitigating evidence" only those conditions which amounted to a "uniquely severe permanent handicap," with which the defendant was burdened through no fault of his own and which bore a causal "nexus" to the crime. *See* Tennard, 542 U.S. at 283-84. As this Court recognized in Tennard, such a "restrictive gloss" had the effect of foreclosing relief under Penry before the reviewing court even undertook any analysis of the adequacy of the pre-1991 "special issues" to accommodate the defendant's particular mitigating evidence. Id. at 286. It thereby short-circuited the process of ensuring that the jury had made an appropriately individualized judgment about the defendant's sentence.

It is now clear that in response to Tennard (and in willful ignorance of Smith), the Fifth Circuit has simply transformed its former "screening test" into a set of *per se* rules for denying Penry claims "on the merits." In every case in which the court below has refused Penry relief in the face of

mitigating evidence of childhood deprivation or abuse and/or mental disorder, it has attempted to distinguish Penry with the observation that the defendant's mitigating evidence is not as "severe" as Penry's, often by focusing on the defendant's ability to "learn from his mistakes." *See, e.g.*, Brewer, F.3d at 281 ("mental illness [is not] tantamount to mental retardation for the purposes of our [Penry] case law"), id. ("There does not appear to be one iota of evidence suggesting either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result of it"); Cole, 418 F.3d at 506 ("Unlike the evidence in Penry, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes"); Coble, 444 F.3d at 362 ("Coble's evidence is distinguishable from that in Penry. The abuse suffered by Penry resulted in a mental impairment that caused Penry to be in some way unable to learn from his mistakes. It is this inability to learn from one's mistakes that suggests a 'yes' to the future dangerousness special issue and prevents the jury from being able to properly consider the defendant's abusive childhood as mitigating evidence. Coble does not argue that his troubled childhood resulted in any mental impairment that prevented him from learning from his mistakes.") (citation omitted).

This approach fails to grasp the profound importance of ensuring that every defendant sentenced under the pre-1991 statute was, *in fact*, treated individually – as the Eighth Amendment requires. As Smith emphasizes, jury instructions that afford "*full* consideration and *full* effect" to proffered mitigating evidence are important not for their own sake, but because giving the jury a direct and unambiguous vehicle for responding to mitigating evidence is essential to the task of "choosing the defendant's appropriate sentence." 543 U.S. at 38. The Fifth Circuit's mechanistic approach, under which any evidence not identical to Penry's is treated automatically as falling outside the ambit of Penry and Smith, fails to accord due regard to genuine individualization as an

indispensable feature of a constitutionally adequate capital sentencing system. *See* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (Eighth Amendment "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered" by the sentencing authority at trial). The resulting systemic failure to protect the right to individualized sentencing, and thereby ensure a strong link between moral culpability and resulting sentencing verdicts, is a serious matter that warrants plenary review by this Court. *Cf.* Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (diversity of views in the U.S. about the propriety of capital punishment "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate ....").

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by the same constitutional flaw as those in Penry and Smith. Jurors heard mitigating evidence about Petitioner's youth, physical and psychological abuse as a child, and serious mental illness. Individually or collectively, that evidence could well have persuaded them to spare Petitioner's life. The jurors, however, were limited to instructions that "had little, or nothing, to do with" Petitioner's mitigating evidence and thus gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

This Court has explained that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams, 529 U.S. at 398. Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing

capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the importance of reviewing – and reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of *certiorari* to give plenary review to the judgment below. In the alternative, if the Court elects to consider the proper scope of Penry I in another case, Petitioner prays that the Court hold his case pending that decision;[7] or summarily reverse the judgment below; or grant such other relief as justice requires.

Respectfully submitted,

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[7] We expect the coming weeks will see petitions to this Court from numerous death-sentenced Texas prisoners seeking review of Penry issues denied by the Fifth Circuit or the Texas Court of Criminal Appeals, including one (Coble) who faces an August 30 execution date.